IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 339 OF 1991

1. MEHROO MEHERJI VAKIL of Bombay)
Indian Inhabitant residing)
at Block No.5, 2nd floor,)
Roxana Building, 109, M.Karve)
Road, Bombay - 400 020.)

2. Dr.(MRS) MEHER JIMMY VAKIL)
of Bombay Indian Inhabitant)
residing at Hari Nivas,)
26-B New Queens Road,)
Opp. Roxy Cinema,)
Bombay 400 004.)

3. JIMMY DHUNJISHAW VAKIL)
also of Bombay Indian)
Inhabitant residing at)
Hari Nivas, 26-B New Queens)
Road, Opp. Roxy Cinema,)
Bombay - 400 004.).. PLAINTIFFS

VERSUS

1.	JAL H. A. VAKIL of Bombay Indian inhabitant residing at Najoo Mansion Wode House Road, Colaba, Bombay 400 005.	))) Deleted as) per order dt. 25.6.2001.
2.	KAIKHUSHROO ALPAIWALA of Bombay Indian Inhabitant residing at Everest House, Carmichael Road, Bombay 400 026.	)) Deleted as) per order dt.) 25.6.2001.)
3.	Siloo Kavarana also of Bombay Indian Inhabitant residing at 59 Wodehouse Road, Colaba, Bombay 400 005.	) Deleted as) per order dt.) 12.1.2006.)
4.	SAM MINOCHER KHANSAHEB Indian Inhabitant residing at 12/836, Bhavangri Street, Vanki Bordi, Surat 395 003 Surat, Gujarat State.	) Deleted) as per order) dt.23.6.05.))
5.	ROSHAN SAM KHANSAHEB Indian Inhabitant residing at 12/836 Bhavangri Street, Vanki Bordi, Surat 395 003.	) Deleted as) per order) dt.25.6.2001)

6. SHIRAZ B. ANKLESHARIA)
Bombay Indian Inhabitant)
residing at 1980, Covent Street)
Sakar Villa Camp,)
Pune 411 001.)

7. ASPI BYRAMJI ANKLESHARIA)
Indian Inhabitant residing)
at 1980 Convent Street,)
Sakar Villa, Pune 411 001.)

8. PILOO SAM SHROFF of Bombay) Deleted as
Indian Inhabitant residing) per order
at Cosy Building, 3rd flor,) dt.11.7.2003
Gowalia Tank, Bombay 400 036.)

8A. THRITY SAM SHROFF,)
of Bombay Indian Inhabitant)
purported to be residing at)
Roxana, 109, M. Karve Road,)
Mumbai 400 020.)..DEFENDANTS

Mr. H.J.Thakkar, Senior Advocate with Mr. Vishal Thakkar & Ms. M.Meherjee i/b. M/s. Gagrats for the Plaintiffs.

Mr. R.S.Jaisinghani with Mr. Rafeeq Peermohideen i/b. H.R.Yadav for Defendant No.6.

Mr. R.S.Jaisinghani with Rafeeq Peermohideen i/b. Fazalbhoy Motaframe for Defendant No.7.
Mr. R.M.Bagalia for Defendant Nos. 8 & 8A.

JUDGEMNT RESERVED ON: 19.4.2006.
JUDGMENT PRONOUNCED ON: 05.5.2006.

ORAL JUDGMENT :

1. This is the Suit for declaration that the Defendants are trespassers and for decree for eviction of the Defendants.

2. The suit premises consists of the portion of the Flat No.5 and garage No.10 in a building known as Roxana" situated at 109, Maharshi Karve Road, Bombay - 400 020. The said portion is described in the blue lines on the plan marked Exhibit "P-4".

3. The 1st Plaintiff is the widow of one Meherji J. Vakil (hereinafter referred to as "Meherji Vakil"). The plaintiffs Nos. 2 and 3 are husband wife.

4. The Building Roxana was constructed in the year 1938. The suit premises was then let out by the then landlords to one Banoobai Vatchagandhy as a monthly tenant. She was residing in the suit premises along

with the deceased Meherji Vakil and Bomanshaw Vakil (hereinafter referred to as "B.R.B. Vakil")

5. It would be relevant to mention at this juncture the family tree as it would be relevant for the purpose of the suit. Bomanshaw Vakil had two sons - Jamshedji and Rustomji. The deceased Meherji Vakil is the son of Jamshedji and plaintiff No.1 is the wife of Meherji Vakil and Dhunjishaw was another son of Jamshedji and plaintiff No.3 Jimmy son of Dhunjishaw and plaintiff No.2 is the wife of plaintiff No.3. Rustomji had three issues - Khoershed, Bomanshaw and Shera. Khorshed is the mother of defendant no.8. Khorshed had two issues - Sam (defendant no.4) and Piloo (defendant no.8). Bomanshaw (B.R.B.Vakil) was unmarried till his death. Shera had three issues - Roshan, Shiraz and Aspi who are defendants Nos.5, 6 and 7.

B.R.B. Vakil died on 9.10.1989 leaving behind

the Will dated 23.2.1988 under which the defendants Nos. 1, 2 and 3 are executors. As such, the defendant No.4 and defendant No.8 are the heirs of B.R.B. Vakil’s sister, Khorshed and the defendants Nos. 5, 6 and 7 are the heirs of Shera - another sister of B.R.B.Vakil. During the pendency of this

suit, the names of defendants Nos.1,2, 3, 4, and 5 were deleted. The defendant no.8 died during the pendency of the suit and her heir Thrity Sam is brought on record as defendant No.8A. Consequently, the contesting defendants are only defendants Nos.6, 7 and 8A.

6. Banoobai Vatchagandhy died in 1946 and upon her death, the tenancy in respect of the suit premises devolved upon the deceased Meherji and B.R.B.Vakil, the heirs of Banoobai who were living with her at the time of her death. Since that time, the deceased Meherji and B.R.B.Vakil were jointly living in the suit premises and the tenancy in respect of the suit premises was one vis-a-vis the landlord.

7. In 1955, the deceased Meherji married plaintiff No.1 and since then plaintiff No.1 was also residing in the suit premises. The said B.R.B.Vakil was a bachelor until he died on 9.10.1989. All along he was using the portion of the suit premises which is marked by blue lines as shown in the plan annexed to the plaint and marked Exhibit "B". The portion marked by red lines was in occupation of the deceased Meherji and the rest of the flat which is marked by green lines was in the common use of both of them.

8. Roxana Building was owned by different landlords and lastly in the year 1984, one Murarilal Gupta Kamanwala and others became landlords of the said Building. Along with Murarilal Gupta Kamanwala, the other landlords were O.P. Khandewal Kamanwala, Surendra Kumar Gupta, Mrs. Neeta Jain and Mrs. Sudha Gupta Kamanwala being the members of the undivided Hindu Family. In 1984, these landlords had approached all the tenants of Roxana Building including Mrs. Meherji and B.R.B.Vakil and offered to sell the respective rented premises to the occupants if they agreed. The landlords also proposed that if any tenants were not ready, their tenements could be purchased by others. Similar offer was also made to deceased Meherji and B.R.B.Vakil and ultimately, deceased Meherji and plaintiff No.2 along with plaintiff Nos. 1 and 3 purchased the suit premises as B.R.B.Vakil was not willing to purchase it (and the controversy with regard to B.R.B.Vakil having refused the offer to purchase the flat which I shall consider little later).

9. The agreement for sale was executed between the landlords and the deceased Meherji and plaintiffs Nos. 1, 2 and 3 on 17.1.1985 for a consideration of Rs.1,50,000/-. The said agreement is produced at Exhibit "P-2". The entire consideration of

rs.1,50,000/- was paid by the purchasers - deceased Meherji and plaintiff No.2 in equal shares to the landlords. The requisite Form No.37-EE as required under the provisions of the Income Tax Act was duly completed and registered which is produced at Exhibit "P-3". Under the original agreement, Exhibit "P-2", dated 17.1.1985, the vendors had agreed and undertaken to form a registered Co-operative Housing Society having its name "Roxana Churchgate Co-operative Housing Society (Proposed)" under the provisions of Maharashtra Co-operative Societies Act, 1960. On the same day i.e. 17.1.1985, a Supplemental Agreement was executed between the vendors and the purchasers - deceased Meherji and plaintiff No.2 which is produced at Exhibit "B-1" which provided that the vendors for no fault of theirs and for reasons beyond their control, they are unable to form and register the said Co-operative Housing Society, the purchasers shall have an option to call upon and require the vendors to obtain an assignment and transfer of the respective premises of Roxana Building from Madanlal Gupta HUF, the vendors. As a matter of fact, the Co-operative Society of the flat purchasers of Roxana Building could not be formed and registered and as such deceased Meherji and plaintiff No.2 called upon the vendors to execute the deed as agreed and, accordingly, the Deed of Assignment dated 16.3.1995,

Exhibit "P-6" was executed. This fact has been incorporated in the plaint by way of amendment of the plaint.

10. It is not in dispute that deceased B.R.B.Vakil continued to live in the suit premises in the portion marked in blue ink in Exhibit "P-4" till his death on 9.10.1989.

11. It is alleged by the plaintiffs that since after the death of original tenant - Banoobai, deceased Meherji and B.R.B. Vakil became the joint tenants in respect of the suit premises being the heirs of deceased Banoobai. The landlords also transferred the tenancy jointly in the name of deceased Meherji and B.R.B.Vakil. The tenancy in respect of the suit premises was single tenancy. It is further alleged by the plaintiffs that by virtue of the agreement dated 17.1.1985, the deceased Meherji and plaintiff No.2 became owners of the suit premises and thus the tenancy in respect of the suit premises extinguished and merged in the deceased Meherji and the 2nd plaintiff. It is further alleged that even thereafter B.R.B. Vakil continued to use the blue marked portion of the suit premises only as gratuitous licensee as the deceased Meherji and plaintiff No.2 allowed him to occupy the same. It is further alleged that there was

no attornment of tenancy to the deceased Meherji and the plaintiff No.2 by the said B.R.B. Vakil. B.R.B.Vakil had also stopped paying anything to anybody for use and occupation of the portion of the suit premises. The last rent of Rs.401.70 ps. shared by deceased Meherji and B.R.B.Vakil for the month of December 1984 and from and after January, 1985, the deceased Meherji and plaintiff No.2 have paid for and discharged all the outgoings in respect of the suit premises including all contributions for maintenance, Municipal taxes,repairs, electricity bills, etc. It is alleged that B.R.B. Vakil continued to be gratuitous licensee till his demise on 9.10.1989.

12. It is further alleged by the plaintiffs that B.R.B.Vakil resided in the portion of the suit premises all along alone. The deceased Meherji Vakil and plaintiff No.2 were looking after B.R.B.Vakil. All the heirs except the defendant No.8 resided out of Bombay. B.R.B.Vakil never had a car and as such the garage No.10 was all along used by Meheraji Vakil for parking his car. The plaintiffs further allege that on the death of B.R.B. Vakil, Meherji Vakil and plaintiff No.1 became the sole tenant and by virtue of acquisition of ownership rights, they became owner of the entire suit premises.

13. In the alternative, the plaintiffs allege that Meherji Vakil and the plaintiffs being the only members of B.R.B.Vakil family at the time of latter's death, whatever rights deceased B.R.B.Vakil had devolved solely upon Meherji and the plaintiffs.

14. The plaintiffs further allege that on 11.11.1989, the deceased Meherji received a letter from the defendant No.1 ... being the executors of the deceased B.R.B.Vakil's Will falsely claimed right in respect of the portion of the suit premises. They further allege that on 13.11.1989, the defendant No.1, defendant No.3 and defendant No.4 made false entry in the portion of the suit premises and trespassed upon it claiming a right to exclusively use a portion of the suit flat and the garage. It is further alleged that on 20.11.1989, the defendants Nos. 4 to 8 claiming to be heirs and legatees under the Will of deceased B.R.B. Vakil filed a suit, being Suit no.8547 of 1989 against deceased Meherji praying for injunction from dispossessing or parting with possession of the suit premises. The suit was filed in the City Civil Court, Bombay. The Court refused the interim injunction as Meherji Vakil's Advocate made a statement that Meherji had no intention of taking any legal steps to disturb the unauthorised possession of the plaintiffs and that they were

intending to take legal proceedings for removal of the defendants from the portion of the suit premises.

15. The plaintiffs therefore allege that the defendants are trespassers on the suit premises and are in wrongful occupation of portion of the suit premises and therefore they filed the suit for declaration. The plaintiffs further claim damages and mesne profits for unlawful occupation of the suit premises by the defendants.

16. The defendants Nos. 1 to 3, the defendants Nos.4, 5, 6 and 8 and defendant No.7 had filed independent written statement resisting the suit.s Since the defendants Nos. 1 to 3 are no more parties to the suit, I do not consider their written statement which is on record.

17. The defendants Nos. 4, 5, 6 and 8 resisted the suit on the ground the the suit premises i.e. flat No.5 was consisting of two independent flats which were described as "western flat" being in occupation of the plaintiffs and the southern flat which is marked in blue in the sketch, Exhibit "P-4" called "southern flat" They contend that they were legal representatives and beneficiaries under the Will of deceased B.R.B.Vakil and were in actual possession and

occupation of the southern flat. B.R.B.Vakil was in exclusive use, occupation and possession of the said southern flat. They deny that Meherji Vakil and B.R.B. Vakil were joint tenants. They contend that both of them were tenants in common and both were residing separately in their respective portions of the flat. They further contend that deceased B.R.B. Vakil was ready to purchase the suit premises, but deceased Meherji Vakil revoked the option given to B.R.B. Vakil by the landlords. They deny that Meherji Vakil and the plaintiffs have become owners under the agreement for sale dated 17.1.1985. They contend that B.R.B. Vakil had a right to purchase the suit premises from the landlords and, in fact, he was ready and willing to purchase the same, but the deceased Meherji Vakil and others surreptitiously and fraudulently deprived B.R.B. Vakil to purchase the same. They further contend that they were all residing with B.R.B. Vakil at Bombay during his lifetime and also staying with him in the hospital and even after the death of B.R.B. they continued to use and occupy the said portion of the suit flat in their own right being the only heirs of deceased B.R.B. Vakil. On these contentions, they claimed dismissal of the suit.

18. The defendant No.7 resisted the suit by Written

Statement dated 29.9.1998 and the additional written statement dated 10.4.2000. His contentions are also similar to that of defendants Nos. 4, 5, 6 and 8. He further contends that Meherji Vakil and plaintiff No.1 had no right to enter into an agreement for purchase ignoring the interest of B.R.B.Vakil. The agreement is, therefore, void. He further contends that whatever rights Meherji and plaintiffs have acquired under the alleged agreement dated 17.1.1985, must be deemed to have been held in trust in favour of B.R.B. Vakil during his lifetime and after his death in favour of the defendants Nos. 4 to 8 to the extent of their half share as tenants in common in respect of the suit premises. He further contends that on the demise of Banoobai Vachagandhy, B.R.B. vakil and Meherji Vakil became tenants in common in respect of the suit premises and not joint tenants as alleged by the plaintiffs. As such, defendant No.7 prays for dismissal of the suit.

19. The defendant No.8 resisted the suit by Written Statement dated 10.4.2000 during her lifetime raising similar contentions as are raised by the other defendants. In addition, she contends that the defendant No.8 left the Roxana premises somewhere in 1951 when she got married. In 1975, she became widow as her husband expired. Since 1975, she continued to

reside in the suit premises of Roxana Building with late B.R.B.Vakil. She contended that the defendants Nos. 4 to 7 being permanently based outside Bombay, never ever permanently resided with B.R.B.Vakil although they used to often visit B.R.B. Vakil. She also contends that B.R.B.Vakil was exclusively and independently in possession of the blue portion of the suit premises. As such, she contends that as she was living with B.R.B. as his family member at the time of his death, she has right to occupy the suit premises as tenant.

20. After the death of defendant No.8, the defendant No.8A was brought on record as a legal representative. Defendant No.8A has also filed independent written statement resisting the suit. She raised the same contentions as were raised by the other defendants, including defendant No.8.

21. In view of these pleadings, the following issues arise for my consideration :-

	ISSUES	**FINDING**
1.	Whether the Plaintiffs prove that they are entitled	In the affirmative.

	to represent the estate of Meherji Vakil ?	
2.	Whether the Plaintiffs prove the alleged agreements dated 17th January 1985 and 16th March 1995 referred to in paras 9 and 9B of the Plaint?	In the affirmative.
3.	Whether the Defendants are liable to pay a sum of Rs.1,00,800/- for the compensation till 31.1.1991 as claimed in Para 23 of the Plaint ?	In the negative.
4.	Whether the Defendants are liable to pay mesne profits from the date of the suit till possession of the suit premises is handed over ?	In the affirmative.
5.	Whether the Defendants prove that the agreements dated 17.1.1985 and 16.3.1995 are void ?	In the negative.

6.	Whether the Defendants prove that any rights acquired by the Plaintiffs under the agreements dated 17.1.1985 and 16.3.1995 are held in trust by the Plaintiffs in favour of the Defendants to the extent of a one half share therein as alleged in Para 8 of the Written Statement and paras 2 and 4 of the additional Written Statement of Defendant No.7 ?	In the negative.
7.	Whether the Plaintiffs prove that the said Meherji Vakil and the Plaintiffs became owners of the suit premises as alleged in paras 10 to 12 of the Plaint ?	In the affirmative.
8.	Whether the Plaintiffs prove that the tenancy in respect of the suit premises was extinguished as alleged in para 11 of the Plaint ?	In the affirmative.

9.	Whether the Plaintiffs prove that late B.R.B. Vakil became a gratuitous licensee in respect of the suit premises as alleged in para 11 of the Plaint ?	In the affirmative.
10.	If answer to issues 9 and 10 are negative, whether the Plaintiffs prove that the tenancy of B.R.B.Vakil devolved on his death upon Meherji Vakil as alleged in para 13 of the Plaint ?	Does not arise
11.	Whether the Plaintiffs prove that the Defendants are trespassers in the suit premises as alleged in para 20 of the Plaint ?	In the affirmative
12.	Whether Defendant No.8 proves that she has been residing in the suit premises since after she became widow as a member of family and continued to stay there ?	In the negative.
13.	What reliefs and order ?	Suit is decreed in

terms of prayer (a) & (b). No order as to costs.

ISSUE NO. 1:

22. According to the plaintiffs, deceased Meherji and plaintiff No.2 had agreed to purchase the suit flat under the agreement dated 17.1.1985. Subsequently, there was a deed of assignment executed on 16.3.1995. Both these documents are produced at Exhibits "P-2" and P-6". In subsequent issues, I would discuss as to whether these documents are proved and transfer the ownership in respect of the flat. However, for the purpose of this issue, it is necessary to see whether the plaintiffs are entitled to represent the estate of Meherji Vakil. In this regard, there is a Will of the deceased Meherji Vakil which is duly probated by this Court and the said Probate has been produced at Exhibit "P-1". The Will is dated 3.5.1990. Deceased Meherji Vakil died on 21.8.1990. As such, the Will has come into effect and it has also been probated. Under the said Will, the plaintiff No.1, plaintiff No.2 and plaintiff No.3 are the executors of the Will. The Will also describes the properties belonging to the deceased Meherji and one of those properties was the suit premises. It is also mentioned with regard to the agreement for sale dated 17.1.1985 under which deceased Meherji and plaintiff No.2 had agreed to purchase the

suit flat. Under the circumstances, the plaintiffs are entitled to represent the estate of Meherji including the suit flat.

23. With regard to this issue, the argument was advanced behalf of the plaintiffs that in addition to the probate of deceased Meherji Vakil, now there is Deed of Assignment dated 16.3.1995 in favour of the plaintiffs whereby the plaintiffs are entitled to file this suit for possession of the suit premises from the defendants who are trespassers. It is further submitted on behalf of the plaintiffs that after the said deed of assignment was executed the original owners - landlords, the plaintiffs sought amendment of the plaint. After the amendment was allowed by the Court after hearing the defendants, the plaint has been amended. It is, therefore, their contention that the said amendment would relate back to the date of filing of the suit without any hindrance on account of limitation and thus, the plaintiffs are entitled to file the suit for possession. It is matter of fact that the application for amendment was made and amendment has been allowed by this Court. As a result, the plaint has been amended incorporating the fact of the plaintiffs having in their favour the deed of assignment executed by the original landlords (the submissions with regard to this deed of assignment is proved or not which I

shall consider little later while considering the issue in that regard). At this stage, however, the contention raised on behalf of the defendants was that even if the deed of assignment is held to be proved, the assignment came into effect from the date of its execution i.e. 16.3.1995 and thus, the ownership if at all the plaintiffs are required was with effect from that day and not earlier. It is further submitted on behalf of the defendants that what is necessary for maintenance of the suit is that the plaintiffs must have had the cause of action to file suit for possession at the inception when the suit which came to be filed in 1991. The submission on behalf of the defendants is that this was not available to the plaintiffs even on the ground of subsequent assignment having been executed in their favour. Quite a few authorities have been cited on behalf of the defendants in this regard. However, I do not propose to deal with those authorities as this aspect has been settled by the decision of the Apex Court rendered in the case of **Sampat Kumar Vs. Ayyakannu and another,** reported in AIR 2002 SC 3369.In that case before the Apex Court, the plaintiff had filed a suit in the year 1988 for issuance of permanent prohibitory injunction alleging that the plaintiff-appelant’s possession over the suit property. In the year 1999 but before commencement of the trial, the plaintiff moved an application under Order 6 Rule 17

seeking an amendment in the plaint alleging that in January 1989, i.e. during the pendency of the suit, the defendant had forcibly dispossessed the plaintiff. Therefore, the plaintiff sought relief of declaration of title to the suit property and consequential relief of delivery of possession. While allowing the amendment, the Apex Court held that the basic structure of the suit would not be altered by the proposed amendment. The relevant observations are as under :-

> "11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of direction to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of

> amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right to accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the relief of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed."

In the same judgment, the Apex Court also affirmed the view expressed by it in another case in Siddalingamma vs. Mamtha Shenoly reported in AIR 2001 SC 2896 in which it was held :-

> "10. An amendment once incorporated relates back to the date of the suit. However, the

> doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed."

24. In the present case also, on the basis of the subsequent event i.e. the deed of assignment executed by the landlord-owner in favour of the plaintiffs, the plaintiffs could have filed suit for possession against the defendants alleging that they were trespassers. Since the amendment is allowed by this Court as held by the Apex Court in the aforesaid case, it would relate back to the date of the suit. It is clear that while allowing amendment in this case, this Court has not directed that the amendment so permitted shall not relate back to the date of the suit and that the question of limitation would be open. Having not so directed by this Court, the amendment would relate back to the suit entitling the plaintiffs to file the suit for possession.

25. Thus, in the first place, there is probated Will of deceased Meherji Vakil in favour of the plaintiffs and one of the plaintiffs is a purchaser under the agreement of sale. Therefore, the plaintiffs were entitled to represent the estate of Meherji and file suit for possession against the defendants who are alleged to be trespassers. Even otherwise, as a result of the subsequent event of assignment deed having been executed in favour of the plaintiffs, the plaintiffs are entitled to file the suit for possession as the amendment carried out to the plaint would relate back to the suit, so as to avoid multiplicity of proceedings which the plaintiffs could have undertaken by filing the suit for possession on the basis of assignment deed having been passed in favour of the plaintiffs in 1995. In this regard, in the same decision of the Apex Court, the following observations are made :-

> "7.....We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings."

As such, this issue is answered in the affirmative.

ISSUES NOS. 2, 5 & 7 :

26. While considering these issues, it has to be borne in mind that the suit is filed for possession from the trespassers alleging that the trespassers had no right to the possession of the suit premises. This is not the suit between the two rivals claiming title to the suit property. It is in this light that the evidence led by the plaintiffs will have to be considered with regard to the aspect of title and possession. When the suit is against trespassers for possession, the plaintiffs may establish the right to get possession putting forth better title as against the defendants.

27. It is the case of the plaintiffs that initially Jasawala was the owner of Roxana Building which comprises of the suit premises. By Indenture of Assignment of Rights dated 26.2.1982, which was put up for registration on 1.9.1984, Jasawala, original owner and landlord assigned the rights of Roxana Building to Madanlal Gupta HUF. By agreement of sale dated 15.2.1984, in favour of Murarilal Gupta Kamanwala and others, Madanlal Gupta HUF transferred the rights in favour of Murarilal Gupta Kamanwala and others. It is thereafter that Murarilal Gupta Kamanwala and others

executed the agreement of sale dated 17.1.1995, Exhibit "P-2", in favour of deceased Meherji Vakil and the plaintiffs. By deed of assignment dated 16.3.1985, Madanlal Gupta HUF,original owner and Murarilal Gupta Kamanwala and others jointly transferred Roxana Building in favour of the plaintiffs. This deed of assignment being Conveyance dated 16.3.1995 has been registered with the Sub-Registrar on 14.7.1995. The agreement of sale dated 17.1.1985 is produced at Exhibit "P-2". This agreement has been executed by Murarilal Gupta Kamanwala in favour of the deceased Meherji and the plaintiffs. In this agreement of sale, there is reference to the previous transaction of transfer of ownership of Roxana Building from Jasawala to Madanlal Gupta and then to Murarilal Gupta Kamanwala and others has been mentioned. Although the defendants have disputed the ownership of Madanlal Gupta and Murarilal Gupta Kamanwala, it is a matter of fact that after the deceased Meherji Vakil and B.R.B. Vakil inherited the tenancy of Banoobai, they were jointly paying the rent to the owner and lastly they have jointly paid rents to Madanlal Gupta and Murarilal Gupta Kamanwala. In that regard, various receipts have been produced by the defendants. Those receipts are produced at Exhibit "D-17". These receipts are from March 1982 to May, 1984 and they are in favour of Madanlal Gupta HUF. In this regard, the defendants' witness (DW-1) has admitted that towards the end of 1981

Jasawala sold the entire property of Roxana Building to Madanlal Gupta HUF. The witness also further admits that from then onwards B.R.B.Vakil paid rent to Madanlal Gupta HUF who was the landlord of the building and B.R.B.Vakil paid his half share of the rent. This being the admitted position, it has been established by the plaintiffs that Jasawalas were the original landords and have transferred their ownership to Madanlal Gupta HUF.

28. It is thereafter that on 15.2.1984, Madanlal Gupta HUF entered into agreement of sale of their rights in favour of Murarilal Gupta Kamanwala and others and then by the agreement of sale dated 17.1.1985, Exhibit "P-2", Murarilal Gupta Kamanwala and others transferred their interest to deceased Meherji Vakil and the plaintiffs. The agreement at Exhibit "P-2" explains that by a Deed of Assignment dated 26.2.1982 executed by Mrs. Gool J.Jassawala and others in favour of Madanlal Gupta HUF as Karta and Manager of Joint Undivided Hindu Family, the property in Roxana Building was transferred in favour of Madanlal Gupta. He then further explains that by agreement dated 15.2.1984 made between Madanlal Gupta in his capacity as Karta and Manager and owners had created interest in Mrs. Utsav Jain and Ravi Jain who had agreed to purchase the leasehold land and Building Roxana. But subsequently they withdrew as purchasers and gave up their right, title and interest

in the land and the building and thereafter the owners i.e. Madanlal Gupta by Supplemental Agreement dated 2.10.1984 between Madanlal Gupta and the vendors viz. Murarilal Gupta Kamanwala and others transferred the ownership and the possession in the land and building in favour of the vendors viz. Murarilal Gupta Kamanwala and others. After giving this explanation, Murarilal Gupta Kamanwala and others executed the aforesaid agreement, Exhibit P-2, in favour of deceased Meherji Vakil and the plaintiffs. Under this agreement, the total consideration agreed was Rs.1,50,000/- and the entire consideration was paid. There is a clear endorsement at the bottom of the agreement to that effect. The agreement has been signed by Kamanwala for himself and as constituted attorney of other vendors.

29. Under this agreement, the flat purchasers including deceased Meherji Vakil and the plaintiffs who had purchased the suit flat had agreed to form a Co-operative Housing Society and get it registered. Under term No.27 of the agreement, it was agreed that the purchasers shall not dispose of the flat and garage unless and until the entire property is conveyed to a Co-operative Society or a limited company and the same shall be done soon after obtaining prior consent of such buyer. What was agreed was to form a Co-operative Society and the final conveyance was to be made in

favour of the Co-operative Housing Society, although under the agreement of sale, Exhibit P-2, the entire consideration was paid and the flat purchasers, viz. the deceased Meherji Vakil and the plaintiffs were put in possession of the premises. In fact, Meherji Vakil and the plaintiffs were already in possession of the suit premises as tenants. What is material to be noted is that the entire consideration was paid.

30. It however is the undisputed position that an application for registration of the society of the flat purchasers who were original tenants in the various flats of Roxana Building was made, but the same was rejected not only by the Registrar of Co-operative Societies, but also at the Government level. At the Government level when the appeal was dismissed, it was observed that the flat purchasers had not, strictly speaking, became owners of the flats and therefore Co-operative Society could not be registered. Be that as it may, in view of the fact that Co-operative Society could not be registered, there was execution of the conveyance. At this point of time, it is further to be noted that on 17.1.1985 itself when the agreement of sale, Exhibit P-2, was executed, a Supplemental Agreement was executed which is produced at Exhibit P-5A. By this agreement, duly executed by Kamanwala for himself and as constituted attorney of other vendors had

agreed to execute a deed of assignment/conveyance in favour of the flat purchasers in respect of the respective flats of Roxana Building in case Co-operative Society could not be registered. Pursuant to this Supplemental Agreement, a deed of assignment dated 16.3.1995, Exhibit P-6, came to be executed between the same parties. It was executed by Kamanwala for himself and as constituted attorney of Madanlal Gupta and other vendors. What is necessary to be noted is that Madanlal Gupta (HUF) was the original owner from whom the vendors, viz. Kamanwala and others had agreed to purchase the suit property under an agreement dated 15.2.1984. Since by the said agreement of sale, the property could not be conveyed or assigned to Kamanwala and others, Madanlal Gupta had executed in favour of Kamanwala the power of attorney to execute conveyance in favour of Meherji Vakil and the plaintiffs and accordingly the document was executed.

31. The contention raised on behalf of the defendants is that the agreement dated 17.1.85 is only an agreement and it does not transfer title in the property. The title in the property could be transferred only by way of conveyance or deed of assignment as per the provisions of Section 54 of the Transfer of Property Act. It is further contended on behalf of the defendants that even otherwise the said

agreement dated 17.1.85, Ex.P-2 was executed by Kamanwala and four others in favour of the deceased Meherji Vakil and the plaintiffs. It is further submitted that the agreement proceeds on the basis that one Madanlal Gupta HUF is the owner of Roxana Building and he had executed the agreement of sale in favour of Kamanwala and others. Thus, what deceased Meherji and the plaintiffs obtained in their favour was only an agreement of sale from the purported builders to themselves or in their favour only the agreement of sale and thus were not owners and the owners were only Madanlal Gupta HUF. As such, the title to the property cannot be said to have passed in favour of deceased Meherji and the plaintiffs.

32. Strictly speaking, the contention raised on behalf of the defendants is correct. There should be no dispute that title to the property can pass only by way of conveyance as per the provisions of Section 54 of the Transfer of Property Act.

33. However, on behalf of the plaintiffs, what is contended is that the entire consideration of Rs.1,50,000/- was paid and deceased Meherji and the plaintiffs were already in possession of the suit flat as tenants. Therefore, although strictly speaking, the title to the suit flat was not transferred to the

deceased Meherji Vakil and the plaintiffs they being in possession were entitled to succeed in the present suit which is for possession and filed against the trespassers. In support of this contention, they have relied on the decision of the Kerala High Court in the case of **Ishwara Bhat vs. Annappa Naika** reported in AIR 1997 Ker.165. That was a suit for prohibitory injunction filed on the basis of possession. The Court had granted injunction on the basis of possession. It is submitted on behalf of the plaintiffs that on the same analogy on the basis of possessory title, possession could be claimed by the plaintiffs from the trespassers. I am inclined to agree with the submission made on behalf of the plaintiffs, there should be no dispute with regard to the proposition that the possessory title is good against all except the true owner. As I have already stated in the beginning, that the suit is for possession against the trespassers and it is not a suit between the two persons both claiming title to the suit property. Therefore, in view of the facts of this case, if it is established that the defendants have no right to continue in possession of the suit premises and that they are trespassers, the decree will have to be passed against them for possession of the suit premises.

34. In addition to this, now there is deed of

assignment, Exhibit P-6, duly executed in favour of the plaintiffs on 16.3.1995. This has been executed by Murarilal Gupta Kamanwala for himself and as constituted attorney not only of the other vendors mentioned in the agreement dated 17.1.1985 as also in the deed of assignment dated 16.3.95, but also of the original owner Madanlal Gupta HUF. As discussed above, the defendants have no dispute that Madanlal Gupta HUF were the landlords as payment of rent was being made to Madanlal Gupta HUF as could be seen from the various rent receipts produced at Exhibit D-17 by both the deceased Meherji Vakil and deceased B.R.B. Vakil jointly. This establishes the title to the property. Since the pleading with regard to this conveyance/deed of assignment dated 16.3.95 has been incorporated in the plaint by allowing amendment, it will relate back to the suit as having already discussed above. Therefore, at the time of filing of the suit the plaintiffs could be said to be the owners of the property entitled to claim possession from the trespassers to the defendants, if that fact is proved which I shall discuss little later in the concerned issue.

35. With regard to the conveyance or the deed of assignment dated 16.3.1995, what is submitted on behalf of the defendants is that the document of power of attorney executed in favour of Kamanwala had not been

produced. It is further submitted that every link between the claim of ownership under the document of assignment dated 16.3.95 should have been established by the plaintiffs. In this regard, what is necessary to be noted is that the owners, viz. Madanlal Gupta HUF are not challenging the fact of transfer of the suit flat in favour of Kamanwala and others by the agreement to sale executed in their favour dated 15.2.1984 and subsequently in favour of the plaintiffs by conveyance dated 16.3.95,Exhibit P-6. Therefore, the aspect of ownership as has been put forth by the plaintiffs with regard to the strict proof thereof should have been challenged by the rival claimant and not by the trespasser.

36. The conveyance, Exhibit P-6 is duly registered under the Registration Act. It was registered on 14.7.95. Under Section 32 of the Registration Act, the person who presents the document for registration is the person executing the same. As in the present case, the document was executed by Murarilal Gupta Kamanwala being the constituted attorney of Madanlal Gupta HUF and others and Murarilal Gupta Kamanwala himself had presented for registration. Therefore, as required under Section 32 of the Registration Act, registration of the document was properly done and this registration establishes that title has properly passed in favour of

the plaintiffs.

37. What is submitted on behalf of the defendants is where the document is executed by the principal and execution is sought to be submitted on behalf of the agent, the registering authority also has to examine whether the agent has in his favour a power of attorney from the principal. However, this submission is not on the facts of the present case. The document, Exhibit P-6 is executed by Murarilal Gupta Kamanwala and he himself had presented the document for registration. Therefore, here it is not the case that the principal had executed the document and document was presented for registration by his agent in which case the registering authority would require the agent to produce the power of attorney from the principal for presentation of the document for registration. As such, in the present case, the registration was properly done and the Registrar had verified execution of the document by Murarilal Gupta Kamanwala who himself had presented the document for registration. The deed of assignment, Exhibit P-6, cannot be thrown away merely because the power of attorney executed by Madanlal Gupta HUF and other vendors in favour of Murarilal Gupta Kamanwala. That could have been an important aspect had there been the dispute as to the title between Madanlal Gupta HUF and other vendors and Murarilal Gupta Kamanwala.

However, dispute is not between these persons. For the purpose of this suit, the execution of the deed of assignment, Exhibit P-6, by Murarilal Gupta Kamanwala is sufficient for establishing transfer of title from the owners to the plaintiffs. Under these circumstances, in the first place, the plaintiffs have established that they have acquired ownership to the suit premises by paying entire consideration of Rs.1,50,000/- under the agreement to sale dated 17.1.85, Exhibit P-2, and being already in possession. Moreover, subsequently, by a deed of assignment dated 16.3.95, Exhibit P-6, the title had passed. Even otherwise, the plaintiffs being in possession, their suit for possession against the trespassers would be entertainable.

38. Under these circumstances, the issues Nos. 2 and 7 shall have to be answered in the affirmative and issue No.5 in the negative.

ISSUES NOS. 6, 8 & 9 :

39. The case of the plaintiffs is that as a result of the suit flat having been purchased by the plaintiffs, the tenancy in respect of the entire suit flat has merged in the ownership. It is further the case of the plaintiffs that as a result of the acquisition of tenancy rights on the original tenant

Banoobai having expired, Meherji Vakil and B.R.B. Vakil became joint tenants in respect of the suit flat, tenancy of which being one. It is further the case of the plaintiffs that on the death of B.R.B.Vakil, his rights had extinguished and/or devolved by successorship on the deceased Meherji Vakil and the plaintiffs and thus the right of occupancy which B.R.B.Vakil had expired on his death on 9.10.89. The case of the plaintiffs is that B.R.B.Vakil became gratuitous licensee in respect of the portion of the suit flat occupied by him after the suit flat was purchased by Meherji Vakil and the plaintiffs under the agreement dated 17.1.85, Exhibit P-2 and the deed of assignment dated 16.3.95, Exhibit P-6.

40. The case of the plaintiffs further is that at the time of death of B.R.B. Vakil, he alone was residing in the portion of the suit flat. The defendants Nos. 6 and 7 and others had come to stay with B.R.B.Vakil only during his illness and came to occupy the portion of the suit flat after the death of B.R.B.Vakil only for the purpose of performing last rites after his death. Therefore, the case of the plaintiffs is that they are trespassers. As regards defendant no.8, the case of the plaintiffs is that defendant no.8 was never living in the suit flat and she came to occupy the suit flat much after the death of

B.R.B.Vakil. As regards defendant No.8A, who is brought on record after the death of defendant No.8, the case of the plaintiffs is that she was never residing in the portion of the suit flat occupied by B.R.B.Vakil during his lifetime and she came to occupy much later some time in 1994 and therefore she having no right to occupy the suit premises, she was also a trespasser.

41. The plea of the defendants that deceased Meherji Vakil and B.R.B.Vakil became tenants in common after they inherited tenancy from and on expiry of Banoobai is not raised in the written statement. However, it is raised at the time of argument. The same however being the legal point will have to be considered. The case of the defendants therefore is that even though deceased Meherji Vakil and the plaintiffs purchased the suit premises, that was subject to tenancy rights of B.R.B. Vakil in the suit premises and the tenancy being tenancy in common, on the death of B.R.B.Vakil on 9.10.1989, would be heritable and thus would devolve by succession and not by survivorship and the defendants Nos. 6 and 7 who are surviving defendants, being heirs of B.R.B. Vakil, will have right to succeed to the tenancy rights of B.R.B.Vakil and thus they cannot be called trespassers. It is further the case of the defendants that in any case, the deceased Meherji and the plaintiffs purchased the suit flat, they held the suit

flat in trust on behalf of the defendants who were entitled to inherit the tenancy rights of B.R.B.Vakil to the extent of half share in the suit premises. Therefore, the case of the defendants is that they cannot be evicted from the portion of the suit premises.

42. It is undisputed that the tenancy in respect of the suit flat that was created in favour of Banoobai and inherited by the deceased Meherji Vakil and B.R.B.Vakil after the death of Banoobai was one tenancy vis-a-vis the landlord. There should be no dispute that this tenancy is not divisible vis-a-vis the landlord and it can remain only one tenancy for all purposes. It is further undisputed position that after the death of Banoobai itself, Meherji Vakil and B.R.B.Vakil came to jointly occupy the suit premises and they were equally sharing the rent to be paid to the landlord. Although in the written statement the plea is raised that the deceased Meherji Vakil and deceased B.R.B.Vakil had independently occupied separate portion of the suit premises, that however cannot divide the one tenancy which was initially created in favour of Banoobai by the fact of mere independent occupation of the portion of the suit flat. There is no dispute that the portion marked by green lines in the sketch of the suit which is produced at Ex.P-4, was common portion used by both of them. The blue lined portion was independently occupied

by deceased B.R.B. Vakil and the portion marked by pink lines was was occupied by Meherji Vakil. That pink line portion had independent entrance, whereas the blue line portion occupied by B.R.B. Vakil had entrance to the common passage through common passage marked by green lines. It is further undisputed that deceased B.R.B.Vakil was unmarried till his death. Therefore, he was all alone. It is also admitted position that B.R.B. Vakil was staying all alone in his flat and he was sometimes getting food from outside but for all the times Meherji Vakil and his wife, plaintiff No.2, were providing food to B.R.B.Vakil. It is further undisputed position that the kitchen portion was common and it was used by deceased Meherji and his wife. The servants' room was also common. It is further admitted that B.R.B.Vakil did not own any car and Meherji Vakil had a car and garage was used by Meherji Vakil for parking the car. ON behalf of the defendants defendant no.7 has entered the witness box and no other defendants including deceased defendant No.8 or defendant No.8A have entered the witness box and gave evidence with regard to they having occupied the suit premises at any time during lifetime of deceased B.R.B. Vakil. Defendant No.7 has clearly stated in his evidence that B.R.B. Vakil was staying all alone in the suit flat. He has also admitted that after the death of B.R.B. Vakil, defendants Nos. 4 and 5 went to Surat and

defendants Nos. 6 and 7 went to Pune. He has further admitted that defendant No.8 - Pilloo in her evidence admitted that defendant No.8A came to reside in the suit flat only since 1994. He further admitted in his evidence that on 5.7.1994, defendant No.4 was residing at his flat at Gwalior Tank. He further admits that daughter of defendant No.8 i.e. defendant no.8A was residing in England prior to 1994 as she was a British citizen. This evidence therefore clearly establishes the fact that none of the defendants Nos.4 to 8 and 8A was residing with B.R.B. Vakil at the time of his death on 9.10.89. They came to occupy the suit premises much after the death of B.R.B.Vakil. The defendant No.7 has admitted in cross-examination that defendant No.8 was the only beneficiary residing in the suit premises at the time of giving evidence. Defendant No.8 died during the pendency of the suit after the evidence of the parties was closed and the defendant no.8A was also raised. They came to occupy the suit premises only after 1994. The defendant No.8 was also staying in England and returned to India only after her husband expired in 1975. After return to India, she stayed in a flat in 1994. She went to live in the suit flat only after her daughter - defendant No.8A returned to India from England in 1994. Defendant No.7 clearly admits in his evidence that at the time of death of B.R.B.Vakil in 1989, defendant No.8was not residing in the suit flat

and that defendant No.8 never resided in the suit flat prior to 1994. Neither defendant No.8 during her lifetime nor defendant no.8A after she was brought on record has entered the witness box. Therefore, it is established that none of the defendants Nos. 4 to 8 and 8A has ever resided in the suit flat at the time of the death of B.R.B.Vakil on 9.10.89. The defendants nos. 6, 7 and 8A alone are living. The other defendants have been deleted.

42A. Under the circumstances, it should be necessary to consider whether any of the defendants Nos. 6, 7 and 8A has any right to continue to occupy the premises after they came to live in the suit premises much after the death in 1989. It is a fact that these defendants had locked the suit premises after the death of B.R.B.Vakil and kept the key in their possession and did not give possession of the suit portion of the suit flat. That was in possession of deceased B.R.B.Vakil during his lifetime to the plaintiffs.

43. The position as regards the tenancy between the deceased Meherji Vakil and deceased B.R.B.Vakil who came to occupy the suit flat after the death of Banoobai would be material. Whether the tenancy was joint tenancy between them or whether it was a tenancy in common between them. According to the plaintiffs, the

tenancy was joint tenancy and according to the defendants, tenancy was tenancy in common. If it was a joint tenancy on the death of B.R.B.Vakil in 1989 the suit premises would devolve by survivorship and in case tenancy is common, the rights of B.R.B.Vakil would devolve by succession.

44. In this regard, the submission made on behalf of the plaintiffs is that it was a joint tenancy and therefore the tenancy rights of B.R.B. Vakil would devolve by survivorship. The submission made on behalf of the plaintiffs is also that after purchase of the suit flat by deceased Meherji Vakil and the plaintiffs under an agreement of sale dated 17.1.85 Ex.P-2 and subsequently deed of assignment dated 16.3.95, Exhibit P-6, the tenancy would merge into the ownership so acquired by Meherji Vakil and therefore B.R.B.Vakil had only right to occupy the portion of the suit premises and on his death, it will devolve by survivorship on deceased Meherji Vakil and the plaintiffs and thus would merge into ownership by him. The defendants who are in possession would therefore become trespassers and the plaintiffs would be entitled to the decree. In this regard, the plaintiffs have relied on the decision of the Apex Court rendered in the case of **H.C.Pandey v. G.C. Paul reported in AIR 1989 SC 1470,** the relevant observations of the Apex Court are as under :-

> "4. It is now well-settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants..."

45. The learned Counsel for the defendants however submits that these observations were with regard to the relationship between the landlord and the tenant. He submits that so far as the tenancy vis-a-vis the landlord is concerned, it was joint tenancy as tenancy would be one that would be acquired on the death of the original tenancy by his heirs. However, he submits that position would be different amongst the heirs and amongst heirs as was the plea tenancy would be tenancy in common so that on death of one of the heirs, it would devolve by succession on his heirs. The learned Counsel on behalf of defendants Nos. 6 and 7 therefore submits

that on the death of Banoobai, the tenancy that was inherited by Meherji Vakil and B.R.B.Vakil was tenancy in common and on death of B.R.B.Vakil it would devolve on his heirs. The defendants Nos. 6 and 7, as he submits, being the heirs of deceased B.R.B.Vakil, they were entitled to occupy suit premises.

46. In support of his submission, he has placed reliance on the decision of Allahabad High Court in the case of **Smt. Vishnawati vs. Bhagwat Vithu Chowdhry, reported in AIR 1970 All. 389** and the decision of this Court in the case of Mst. Ramubai vs. Jiyaram Sharma,. reported in AIR 1964 Bom.96. Both these judgments are by Single Judge. In the case of Allahabad High Court, the observations are as under :-

> "15....Co-tenants who come to hold a tenancy by inheritance may, for the purposes of succession have an estate as "tenants in common" and not "joint tenants", but the special incidents attaching to a tenancy will not be changed upon the tenancy passing to more than one person by inheritance. In so far as their relationship with the landlord is concerned, they hold the tenancy jointly and for the landlord they constitute one unit..."

In the decision of this Court, it is observed as under :-

> "(11)... In my judgment, the phrase "tenants-in-common" or "joint tenants" used in section 19 of the Hindu Succession Act or in other texts, when considering the rights of owners of property inter se cannot be confused with the right to hold land as joint tenant in the sense as joint lessees or co-lessees or co-tenants of property such as the subject-matter of the suit. The word "tenant" in section 19 is not used in the sense of lessees. That word is used in the sense of owners of property whether they are joint owners of property or holding in defined shares. It is an incident of ownership that has been referred to in section 19 and that incident in the case of persons holding as tenants-in-common is that the devolution i the case of each of these tenants-in-common would be according to the personal law while in the case of persons holding as joint tenants it will be by survivorship. The expression is not germane in deciding whether the leasehold is held as joint tenants. That expression may have led to some confusion and it is preferable to refer to

rights of more than one person holding under the leasehold vis-a-vis the landlord as co-tenants or co-lessees. If understood in that sense, there will be no difficulty in holding that all the co-lessees or co-tenants hold as joint tenants in the sense that they have a single tenancy relationship with the landlord and they are not different tenants vis-a-vis the landlord."

47. The learned Counsel for the defendants also relied on other decisions. However, I do not find it necessary to repeat the same as the position in law as according to him is vis-a-vis the landlord, the tenancy inherited by heirs is joint tenancy however amongst the tenants it is tenancy in common.

48. The learned Counsel for the plaintiffs however has relied on the decision of the Apex Court in the case of **Harish Tandon vs. Addl. District Magistrate, Allahabad, U.P. and others,** reported in (1995) 1 SCC 537 where the view taken by the Apex Court in the case of H.C.Pandey (supra) has been confirmed even as between the tenants who inherited the tenancy. The Apex Court observed as under :-

"22. The attention of the learned Judges

constituting the Bench in the case of H.C. Pandey v. G.C. Paul was not drawn to the view expressed in the case of Mohd. Azem v. Distt. Judge. There appears to be an apparent conflict between the two judgments. It was on that account that the present appeal was referred to a Bench of three Judges. <u>According to us, it is difficult to hold that after the death of the original tenant his heirs become tenants-in-common and each one of the heirs shall be deemed to be an independent tenant in his own right</u>..... (emphasis supplied) We are of the view that if it is held that after the death of the original tenant, each of his heirs becomes independent tenant, then as a corollary it has also to be held that after the death of the original tenant, the otherwise single tenancy stands split up into several tenancies and the landlord can get possession of the building only if he establishes one or the other ground mentioned in sub-section (2) of Section 20 against each of the heirs of original tenant. One of the well-settled rules of interpretation of statute is that it should be interpreted in a manner which does not lead to an absurd situation."

In the same decision, the Apex Court concluded as under :-

> "23. It appears to us, in the case of H.C. Pandey v. G.C. Paul it was rightly said by this Court that after the death of the original tenant, subject to any provision to the contrary, the tenancy rights devolve on the heirs of the deceased tenants jointly. The incidence of the tenancy is the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefor and the heirs succeed to the tenancy as joint tenants."

This decision of the Apex Court therefore clearly settles the position in law that tenancy inherited by the heirs after the death of original tenant the tenancy is joint tenancy and not tenancy in common.

49. In view of the decision of the Apex Court, therefore, on the expiry of B.R.B. Vakil on 9.10.1989, his right of occupancy would devolve by survivorship on the deceased Meherji Vakil and one of the heirs of

B.R.B. Vakil would have right to inherit the tenancy. Thus, the occupation of portion of the suit premises by any of the defendants including defendants No.6, 7 and 8A would be only as trespassers. These defendants even were not living with deceased B.R.B. Vakil at the time of his death and as such they have no right to occupy. Even otherwise, they have no right whatsoever to occupy the suit premises as on the death of B.R.B. his right devolve by survivorship on the deceased Meherji Vakil. Therefore, defendants Nos. 6, 7 and 8A are trespassers.

50. It is undisputed position that B.R.B.Vakil had never paid any rent after deceased Meherji Vakil and the plaintiffs entered into an agreement to purchase the suit premises on 17.1.85. Thus even otherwise, B.R.B. Vakil had not continued his right of occupation having some tenancy rights. It is true that under the agreement dated 17.1.85, Exhibit P-2, whatever rights the deceased B.R.B.Vakil had to occupy the suit premises were continued. That right cannot be said to be as of a tenant as he had not exercised that right by paying rent and even for that reason his occupation of the suit premises was gratuitous occupation and that the gratuitous licence would obviously come to an end on his death on 9.10.89 leaving no right to his heirs to occupy the suit premises. Thus, for this reason, the

defendants nos. 6, 7 and 8A would be trespassers.

51. It is the case of the defendants that in any case when the plaintiffs and the deceased Meherji Vakil had purchased the suit property they were liable to hold it in trust for B.R.B.Vakil. It is also submitted on behalf of the defendants that in fact, both deceased Meherji Vakil and deceased B.R.B.Vakil being co-tenants, the landlord must have given an opportunity to both of them to purchase the property. But no such opportunity was given to B.R.B.Vakil and behind the back of B.R.B. Vakil, Meherji Vakil and the plaintiffs agreed to purchase the flat. As such, B.R.B.Vakil was deprived of the vested right to purchase the suit premises. Even otherwise, when the plaintiffs had purchased it, he would be holding it in trust for the benefit of B.R.B.Vakil and deceased B.R.B.Vakil still have right in the suit premises which could be inheritable. In this regard, however, the case of the plaintiffs is that B.R.B.Vakil was given an offer to purchase the suit premises. He however refused to purchase and it is thereupon that Meherji Vakil and the plaintiffs jointly purchased the suit property. In this regard, relevant are the two letters which are at Exhibits D-1 and D-2. Both these letters are addressed by M.J.Vakil on 5.6.1981, one letter which is atEx.D-1 addressed to B.R.B.Vakil and another letter Exhibit D-2 is addressed

to Jasawalla, the original owner. It is undisputed that deceased Meherji Vakil had given an option to B.R.B.Vakil to purchase the suit premises earlier to writing of these letters. B.R.B. Vakil however refused to exercise that option. Subsequently, by a letter at Ex.D-1, Meherji Vakil revoked the option given to B.R.B.Vakil and he wrote in the letter that it would be an detest idea of joint ownership and he would prefer to become joint owner than be a tenant of diverse personalities and the copy of that letter was sent to Jassawala which is at Ex.D-2 whereby he communicated to Jassawala, the original owner, that the option given by him to B.R.B.Vakil to exercise the option to purchase the suit premises was revoked. This shows the option to purchase was given to B.R.B.Vakil, but he did not exercise the same. Subsequently also Madanlal Gupta HUF had also given an option to B.R.B. Vakil for purchasing the same. This has been stated by the plaintiffs' witness. The plaintiffs' witness also stated that the landlord had approached B.R.B.Vakil in an adjoined room in the suit premises for giving that option, but he returned in ten minutes and told Meherji Vakil that B.R.B. is not interested. In this regard, witness was not personally present when this option was given and there is no cogent evidence in that regard.

52. Apart from this, there is letter dated

23.4.1984, Exhibit P-20. This letter was addressed by B.R.B. Vakil to M.L.Gupta. This was in reply to M.L.Gupta's letter dated 14.4.1984 which is at Ex.D-14. The letter at Ex.D-14 was addressed by M.L.Gupta to B.R.B.Vakil and also to M.J.Vakil. In this letter, he had offered both of them to purchase the suit property on ownership basis. In reply, Exhibit D-20, B.R.B. Vakil however wrote and pointed out certain lacunas in the proposed agreement and also clearly stated that he was not agreeable to purchase the flat. He pointed out certain 21 points on which he was not agreeable and lastly he stated that subject to what has been stated in the letter, discussion can be had about the purchase of flat. This letter has been interpreted on behalf of the plaintiffs as the refusal to purchase, whereas on behalf of the defendants it is interpreted to say that B.R.B.Vakil had pointed out certain lacunas and wanted additional information whereupon he was ready to discuss about purchase of the flat. However, we have to read the letter in totality and having done so, it would be clear that B.R.B. was in fact not ready to purchase the flat. If he had intention to purchase the flat he would have mentioned in clear terms in this letter, Exhibit D-20 that he was ready to purchase the flat but he wanted certain things to be corrected which he has not done so. Lastly, what he has mentioned is that he could have discussion about the purchase of the flat. That

means till that point of time B.R.B. Vakil was not ready to purchase the flat. It is thereafter that in January 1985, the agreement for sale was entered into with deceased Meherji Vakil and the plaintiffs. Therefore, I do not find any merit in the submission made on behalf of the defendants that the flat was purchased by deceased Meherji Vakil and the plaintiffs behind the back and without the knowledge of B.R.B.Vakil.

53. It is further submitted on behalf of the defendants that in any event, when deceased Meherji Vakil and the plaintiffs had purchased the suit flat and which was jointly occupied by Meherji Vakil and B.R.B.Vakil, the flat would be held in trust by Meherji Vakil for the benefit of B.R.B.Vakil. However, the submission is not acceptable as B.R.B.Vakil was clearly given an opportunity to purchase the suit flat but he in the aforesaid circumstances, declined the said offer. For making this submission, reliance is placed on the provisions of Sec.88 of the Indian Trusts Act, 1882. The provisions of Sec. 88 read as under :-

> "88. Advantage gained by fiduciary - Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character for himself any pecuniary

> advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

These provisions however would not apply to the facts of the present case and in case of B.R.B. Vakil. There was no fiduciary relation between Meherji Vakil and B.R.B.Vakil and, as discussed above, Meherji Vakil had also not taken any advantage on account of fiduciary relationship between the two. My attention is also drawn to Section 90 of the Indian Trusts Act. These provisions also do not apply as the provisions apply where advantage is gained by qualified owner who by availing himself of his position as such gains any advantage in derogation of the rights of the other persons interested in the property. In support of his submission, the learned Counsel for the defendants Nos. 6 and 7 has placed reliance on the decision of this Court rendered in the case of **Babani Sairoo vs. Dulba Govind and others,** reported in AIR 1932 Bom.240. In that case, facts were entirely different. According to a resolution by the Government to restore certain lands acquired by it in 1865 to the persons from whom they

were acquired, certain lands were restored to D who claimed to be related to the original owner, on his refunding the compensation money. It is in view of such facts, it was held that although D had refunded the amount of money of compensation and got the lands restored, that land was held by him in trust for the others who were interested in the land. The eventuality was that other persons were not in a position to contribute for refunding compensation although they were given opportunity to restore. Moreover, the land originally belonged to those heirs jointly. As such, they were in fiduciary relationship. However, in our case, although Meherji Vakil and B.R.B.Vakil were joint tenants, there was no fiduciary relationship between the two. As discussed above, B.R.B.Vakil had refused to exercise the option to purchase the suit flat and it is thereupon that Meherji Vakil, and the plaintiffs purchased it. Therefore, it cannot be said that Meherji Vakil and the plaintiffs were holding the suit flat in trust for the benefit of B.R.B.Vakil. Therefore, I do not find any merit in the submission advanced on behalf of the defendants.

54. In this regard, the learned Counsel for the plaintiffs also submitted that on purchase of the suit premises by deceased Meherji Vakil and the plaintiffs, the tenancy in respect of the entire premises as it was

had merged into the ownership rights acquired by the deceased Meherji Vakil and the plaintiffs. This position is quite clear in view of the provisions of Sec. 111 of the Transfer of Property Act.

55. The learned Counsel for the defendants however tried to make the distinction in the sense that the entire reversionary right must have been acquired and then alone the principle of merger would apply. What he means to submit is that the right to occupy available to deceased B.R.B.Vakil continued even after the purchase of the suit flat by deceased Meherji Vakil and the plaintiffs. It is true that the right to occupy available to B.R.B. Vakil were allowed to remain intact, but B.R.B.Vakil was however left with no right to purchase the suit property as the entire reversionary rights were purchased by Meherji Vakil and the plaintiffs on B.R.B.Vakil having refused to exercise the option. Therefore, the situation as would arise would be that on purchase of the suit flat which was one tenancy, that tenancy merged into the reversionary right acquired by the deceased Meherji Vakil and the plaintiffs. Consequently, what remained was only right to occupy by B.R.B.Vakil till his lifetime and that right expired on his death.

56. Under these circumstances, it has been proved

that deceased Meherji Vakil and the plaintiffs had acquired ownership right in respect of the suit premises not only by virtue of the agreement of sale dated 17.1.85, Ex.P-2, but also by virtue of deed of assignment dated 16.3.95, Exhibit P-6. At any rate, the possessory right of plaintiffs and deceased Meherji Vakil were sufficient to entitle them to claim possession of the suit premises from the defendants who were the trespassers as discussed above. Therefore, the suit is maintainable and liable to be decreed as against the defendants who have no right to occupy the suit premises after the death of B.R.B. Vakil. After the death of B.R.B.Vakil it being the joint tenancy, his right would even otherwise devolve by succession on deceased Meherji Vakil and his heirs would not get any right on inheritance in respect of the suit premises. Under the circumstances, issue No.6 is answered in the negative. Issues Nos. 8, 9 and 11 are answered in the affirmative. Issue No.10 does not arise. Issue No.12 is answered in the negative.

ISSUE NO.3 :

57. In this regard, however, the plaintiffs have not led any evidence and therefore this issue will have to be answered in the negative.

ISSUE NO.4 :

58. Since the defendants Nos. 6, 7,8 and now 8A were the trespassers having no right to occupy the suit premises, they are liable to pay mesne profits to the plaintiffs till possession of the suit premises is handed over. In this regard, an inquiry into the mesne profits shall have to ordered to be held under the provisions of Order 20 Rule 12 of the C.P.C.

Hence, the Suit is decreed in terms of prayer clauses (a) and (b). It is further directed that an inquiry shall be made into the mesne profits under Order 20 Rule 12 of the C.P.C. In the facts of the case, no order as to costs.

Decree be drawn accordingly.

(S.K.SHAH,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 339 OF 1991

Mehroo Meherji Vakil & Ors. ... Plaintiffs

Vs.

Jal H.A. Vakil & Ors. ... Defendants

Mr. H.J.Thakkar, Senior Advocate with Mr. Vishal Thakkar & Ms. M.Meherjee i/b. M/s. Gagrats for the Plaintiffs.

Mr. J.P.Sen with Mr. Rafeeq Peermohideen i/b. H.R.Yadav for Defendant No.6.

Mr. J.P.Sen with Rafeeq Peermohideen i/b. Fazalbhoy Motaframfor Defendant no.7.

Mr. R.M.Bhagalia for Defendant No.8 & 8A.

CORAM: S.K.SHAH,J.

DATE 5th May, 2006.

P.C.

1. The learned Counsel for Defednants Nos. 6, 7

and 8A requests for staying the operation of the order passed today for a period of eight weeks from today. The request is granted.

(S.K.SHAH,J.)